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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SKYWEST PILOTS ALPA ORGANIZING
COMMITTEE, *et al.*,

Plaintiffs,

vs.

SKYWEST AIRLINES, INC.,

Defendant.

CASE No. C-07-2688 CRB

**PLAINTIFFS' OPPOSITION TO
DEFENDANT'S MOTION TO
STRIKE TESTIMONY**

Date: n/a

Time: n/a

Place: Courtroom 8, 19th Floor

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SkyWest's motion to strike fails as a matter of law. Many of SkyWest's objections were waived, overruled, or are impermissibly overbroad. Further, all of the challenged testimony is non-hearsay or within a hearsay exception, and the hearsay rule is inapplicable to this proceeding.

I. Many of SkyWest's Objections Were Waived, Overruled, or Are Impermissibly Overbroad.

SkyWest's improperly moves to strike testimony that it never objected to, that does not contain any even arguable hearsay, and that the Court already ruled admitted.

Captain Steve Dow. (1) 6/7/07 Tr. 25:17-21, 27:19-28:2, 28:12-15, 37:2-39:18, 45:15-23, 52:4-16, 64:9-11, 65:13-66:13 – SkyWest did not object to any of this testimony as hearsay, thereby waiving its objection. *San Anton. Hosp. v. S. Cal. Dist. Council*, 125 F.3d 1230, 1238 (9th Cir. 1997) (objection not made until close of direct waived).¹ (2) 6/7/07 Tr. 26:10-12, 27:19-28:10, 28:12-22, 45:15-23, 64:4-66:13 – SkyWest does not address any of this testimony in its brief, thereby waiving its objection. *Miller v. Fairchild Indus.*, 797 F.2d 727, 738 (9th Cir. 1986) (must be “specifically and distinctly argued”). (3) 6/7/07 Tr. 37:2-42:2 – SkyWest waived its objection by failing to address this testimony in its brief and failing to object to most of this testimony during the hearing. *San Anton.*, 125 F.3d at 1238; *Miller*, 797 F.2d at 738. The testimony also does not recount out-of-court statements, except Capt. Dow's (which are not offered for their truth) and the company's (admissions).

Captain David Boehm. 6/7/07 Tr. 166:13-18 – The Court has already overruled SkyWest's objection to this testimony, *id.* 166:17-18, and SkyWest never addresses this testimony in its brief. *Miller*, 797 F.2d at 738. The statements recounted are also the non-hearsay admissions of SkyWest management. 6/7/07 Tr. 49:19-22, 115:11-18, 134:10-15, 166:6-10, 228:9-18, Plfs.' Exh.16.

Captain Andy Bharath. 6/7/07 Tr. 200:18-201:5 – SkyWest never objected to any of this testimony, so its untimely objection was waived. *San Anton.*, 125 F.3d at 1238.

Captain Mark Nolin. 6/8/07 Tr. 122:12-123:11 – SkyWest never addresses this portion of Capt.

¹ Much of this testimony does not contain any hearsay (out-of-court statements offered for their truth), *e.g.*, 28:12-15, 52:4-16, or contains only Captain Dow's testimony about his personal experiences, *e.g.*, 64:9-11, or his testimony about his observations of material posted on either general or SAPA bulletin boards, *e.g.*, 65:13-66:13, or to which SkyWest stated that it had no objection. *Id.* 38:21-22.

1 Nolin's testimony in its brief, so its objection was waived. *Miller*, 797 F.2d at 738.

2 **II. Testimony about Jim Black's Anti-ALPA Statements During Trainings Is Admissible.**

3 Jim Black's admission that he makes anti-ALPA statements during new pilot trainings is non-
4 hearsay under FRE 801(d)(2)(D), which excludes from the hearsay rule statements made by a party's
5 "servant" related to a matter within the scope of employment.² Employees are "servants," *Sana v. Haw.*
6 *Cruises, Ltd.*, 181 F.3d 1041, 1046 (9th Cir. 1999), and it is undisputed that Captain Black is a SkyWest
7 employee. 6/7/07 Tr. 125:9-12; 6/8/07 Tr. 18:8-15, 67:9-10. In fact, Captain Black is paid by the
8 company for his SAPA trainings, 6/8/07 Tr. 87:14-18, which means that his statements about those
9 trainings are "related to a matter within the scope of" his employment. *Hoptowit v. Ray*, 682 F.2d 1237,
10 1262 (9th Cir. 1982); *see also Sea-Land Serv. v. Lozen*, 285 F.3d 808, 821 (9th Cir. 2002).

11 The challenged statements are also admissible as statements against pecuniary interest, given
12 the company's position, 6/7/07 Tr. 325:18-19, that an anti-ALPA presentation would be improper. FRE
13 804(b)(3); *Gichner v. Antonio Troiano Tile*, 410 F.2d 238, 242 (D.C. Cir. 1969) (statement is against
14 interest if could threaten employment opportunities).³ Further, as the Court noted, Captain Black's
15 statements are relevant not only for their truth, but for the chilling effect they are likely to have on
16 listeners (and, as a result, the irreparable harm they are likely to cause). *See* 6/7/07 Tr. 240:5-241:23.

17 **III. Capt. Dow's Testimony Regarding Pilots' Fear of Retaliation is Admissible.**

18 Defendant moves to strike Captain Dow's testimony regarding pilots' fear of retaliation.⁴ This
19 testimony is relevant to proving that pilots have been chilled in the exercise of their RLA rights.

21 ² This section relates to the following: 6/7/07 Tr. 200:11-201:5, 239:13-241:13; 6/8/07 Tr.
22 121:11-122:11. However, SkyWest waived its objection to Capt. Bharath's testimony (6/7/07 Tr.
200:11-201:5) by failing to object during the hearing. *San Anton.*, 125 F.3d at 1238.

23 ³ Plaintiffs could not subpoena Capt. Black, *see* Emerson Decl. (Doc. 106) ¶2(a), and the
24 record makes clear he would not have testified voluntarily for Plaintiffs.

25 ⁴ This argument relates to 6/7/07 Tr. 13:19-15:18, 45:24-46:2. In addition to this testimony,
26 there is ample evidence of pilots' *personal fear* of retaliation – testimony to which SkyWest did not
27 object (and for which there is no plausible hearsay objection). *See, e.g.*, 6/7/07 Tr. at 51:1-14,
116:1-117:3, 123:13-18, 154:2-5, 165:3-7, 168:18-23, 171:1-6. There is also evidence
28 demonstrating these fears to be well-founded: SkyWest denied Captain Alford a promotion *because*
of his union politics, *id.* at 117:4-123:18 & Plfs.' Exh. 10, and threatened Captains Shrier and
Boehm with discharge for wearing their ALPA lanyards, *id.* at 150:15-153:12, 168:11-23.

Captain Dow's testimony is admissible under FRE 803(3), which excludes from the hearsay rule "[a] statement of the declarant's then existing state of mind." In issuing a preliminary injunction against an employer for engaging in unfair labor practices, the court in *Lightner v. Dauman Pallet*, 823 F. Supp. 249 (D.N.J. 1992), relied on FRE 803(3) to reject an employer's effort to exclude on hearsay grounds one witness' testimony that other employees feared retaliation. As in *Lightner*, Plaintiffs offer Captain Dow's testimony "to establish . . . simply that the fear existed. That fear is highly relevant to the propriety of injunctive relief," *id.* at 252 n.2, in particular, the existence of irreparable harm.

IV. The Testimony Regarding Lanyards Is Admissible.

Captain Dow's testimony that numerous pilots reported being ordered to remove ALPA lanyards is admissible for many of the reasons given above.⁵ The pilots who reported incidents to him were employees making statements about a matter within the scope of their employment, the SkyWest uniform policy. *See* FRE 801(d)(2)(D). The fact of their reports is also admissible for the non-hearsay purpose of showing their effect on the listener. Capts. Dow and Alford testified that they came to fear retaliation based on these reports that showing support for the organizing campaign could result in disciplinary action or hurt their careers. 6/7/07 Tr. 71:17-72:5, 116:17-21.

In addition, the sheer number of reports is relevant as circumstantial evidence that there was a problem regarding wearing ALPA lanyards – regardless of the truth of any particular report. *Calmat v. U.S. DOL*, 364 F.3d 1117, 1124 (9th Cir. 2004) ("If the significance of an out-of-court statement lies in the fact that the statement was made and not in the truth . . . , then the statement is not hearsay."). Finally, the testimony should be admitted under the residual hearsay exception because pilot reports are similar to present sense impressions, FRE 803(1), and because Capt. Dow's responsibility for gathering and reporting such complaints as part of his role on the organizing committee makes his compilation akin to a business record, FRE 803(6). *See* 6/7/07 Tr. 12:15-13:3, 25:17-27:16, 53:16-54:15.

V. The Hearsay Rule Does Not Apply to This Preliminary Injunction Proceeding.

Even if some of Plaintiffs' testimony was inadmissible hearsay (which it was not), the law is clear that hearsay evidence is admissible in a preliminary injunction proceeding. While SkyWest

⁵ This pertains to 6/7/07 Tr. 26:13-27:2, 51:21-52:3, 52:4-53:14.

1 contends this rule does not apply under Section 7 of the Norris-LaGuardia Act (“NLGA”), the NLGA
 2 – including Section 7 – is inapplicable here for all of the reasons given in Plaintiffs’ opposition to
 3 SkyWest’s motion to dissolve (Doc. 31).⁶

4 Since NLGA Section 7 does not apply, the law is clear that hearsay evidence may be considered
 5 in support of a preliminary injunction. *See, e.g., Phil. v. Marcos*, 862 F.2d 1355, 1363 (9th Cir. 1988)
 6 (en banc); *Flynt Distrib. v. Harvey*, 734 F.2d 1389, 1394 (9th Cir. 1984).⁷ This rule permitting hearsay
 7 in support of preliminary injunction motions is routinely applied in preliminary injunction evidentiary
 8 hearings – including in at least one labor case involving an injunction against an employer’s interference
 9 with employees’ union activities. *Asseo v. Pan Am. Grain Co.*, 805 F.2d 23, 25-26 (1st Cir. 1986)
 10 (labor case); *Lopez Torres v. N.Y. Bd.*, 411 F.Supp.2d 212, 227 (E.D.N.Y. 2006); *U.S. v. O’Brien*, 836
 11 F.Supp. 438, 441 (S.D. Ohio 1993); *Am. Angus Ass’n v. Sysco*, 829 F.Supp. 807, 816 (W.D.N.C. 1992).

12 CONCLUSION

13 For the foregoing reasons, SkyWest’s motion should be denied in its entirety.⁸

16 ⁶ *See Machinists v. TWA*, 654 F.Supp. 447, 456 (D.D.C. 1987) (Section 7 “inapplicable . . .
 17 where a union seeks to compel an employer to comply with the commands of the [RLA]”), *aff’d in*
 18 *part, rev’d in part on other grounds*, 839 F.2d 809 (D.C. Cir. 1988); *see also Textile Workers v.*
 19 *Lincoln Mills*, 353 U.S. 448, 458 (1957) (holding procedural requirements “inapposite”); *Local 205*
 20 *v. G.E.*, 233 F.2d 85, 92 (1st Cir. 1956); *Smith v. Bowers*, 337 F.Supp.2d 576, 585 (S.D.N.Y. 2004);
 21 *see generally Va. Ry. v. Sys. Fed.*, 300 U.S. 515, 562-63 (1937) (NLGA should not be applied to
 22 frustrate RLA’s purpose); *Bhd. of R.R. Tr. v. Chi. River R.R.*, 353 U.S. 30, 40 (1957) (same).

23 ⁷ This rule reflects that plaintiffs have limited time to prepare their case and gather witnesses
 24 before an injunction hearing, that a preliminary injunction is not a decision on the merits, that
 25 leniency is appropriate to avoid irreparable harm, and that courts are better suited than juries to give
 26 hearsay evidence appropriate weight. *See Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981);
 27 *Flynt*, 734 F.2d at 1394; *U.S. v. White*, 116 F.3d 903, 914 (D.C. Cir. 1997); *U.S. v. Torres*, 504 F.
 28 Supp. 864, 867 (E.D. Cal. 1980); *see also Arcamuzi v. Cont. Air Lines*, 819 F.2d 935, 938-39 (9th
 Cir. 1987) (interference with RLA right is irreparable harm); 5/24/07 Tr. 46:14-16 (Plaintiffs limited
 to 5 pilot witnesses).

⁸ SkyWest lists much testimony in its proposed order that the company never objected to,
 never addresses in its brief, and that does not even arguably contain hearsay. *See Appendix*. If the
 Court is inclined to grant any part of SkyWest’s motion, Plaintiffs respectfully request that the Court
 strike only that testimony SkyWest objected to during the hearing and that actually correlates to the
 specific argument in SkyWest’s brief.

1 Dated: June 14, 2007

Respectfully submitted

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